

BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

KARL and CAROL EGE,
Appellants,

v.

DEPARTMENT OF ECOLOGY,
Respondent.

PCHB NO. 05-033

ORDER DENYING SUMMARY
JUDGMENT

This matter comes before the Pollution Control Hearings Board (Board) on Motions for Summary Judgment filed by both the Appellants Karl and Carol Ege and Respondent Department of Ecology (Ecology). The Eges challenge Ecology's February 9, 2005 denial of applications to change the point of diversion of existing water rights from the surface water of the Methow River to groundwater wells on their property. Ecology denied the change applications on the basis that the Eges' surface water rights had been relinquished because of nonuse. The Eges do not dispute that their water rights have not been used for a period in excess of five years, but contend there was sufficient cause for the nonuse such that there was no relinquishment of the water rights.

The Board was comprised of Chair William H. Lynch and Member Kathleen D. Mix.¹ Administrative Appeals Judge, Kay M. Brown, presided for the Board. Attorney Thomas M. Pors represented the Eges. Sarah Bendersky, Assistant Attorney General, represented Ecology.

¹ The third position on the Board is currently vacant.

1 In rendering its decision, the Board considered the following submittals:

- 2 1. Ecology's Motion for Partial Summary Judgment, Memorandum in Support of
3 Motion for Partial Summary Judgment, Declaration of Robert Barwin with
4 attached Exhibits 1 through 5, Declaration of Sarah Bendersky with attached
5 Affidavits of John Hayes and Karl Ege, Declaration of Verne Woodward, and the
6 Notice of Appeal;
- 7 2. Eges' Motion for Summary Judgment, Memorandum in Support of Motion for
8 Summary Judgment, and the Declaration of Thomas M. Pors with attached Tab
9 No. 1 and 2;
- 10 3. Ecology's Response in Opposition to Appellants' Motion for Summary Judgment,
11 Declaration of Bendersky in Support of Ecology's Response with attached
12 Exhibits 1 through 4;
- 13 4. Eges' Response Memorandum to Ecology's Motion for Summary Judgment and
14 Supplemental Declaration of Karl J. Ege in Opposition to Ecology's Motion for
15 Summary Judgment;
- 16 5. Ecology's Reply Memorandum in Support of Motion for Summary Judgment
17 with Attachments A through D and Declaration of Robert Barwin in Support of
18 Ecology's Reply; and
- 19 6. Eges' Reply Memorandum in Support of Appellants' Motion for Summary
20 Judgment.

21 Having fully considered the record in this case, having listened to argument of counsel,
and being fully advised, the Board enters the following ruling.

Facts

The two surface water certificates at issue here (Surface Water Certificate No. 4096 and 4049) provide for diversion of water from the Methow River in the combined amount of 1.28 cubic feet per second for the purpose of irrigation of a total of approximately 51 acres. These water rights, established in 1936, are appurtenant to property purchased by the Eges in January of 2000. *Declaration of Barwin, and Exs. 1 through 4.*

ORDER DENYING
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1 The Eges' water rights are associated with a shared community ditch system that was
2 historically used to convey water from the Methow River for use in irrigation. The water was
3 diverted from the Methow River into a side channel of the river known as the Sloan-Wichert
4 Slough (SWS). The SWS has been used as a source of irrigation waters since the earliest
5 settlements in the area. It is approximately two miles long and runs roughly parallel to the main
6 channel of the river. Water is supplied to the SWS from the Methow River through a series of
7 three diversion inlets. From the SWS, water is diverted into two south-trending conveyance
8 ditches, the McKinney Mountain Ditch (MMD) and the Kumm-Hollaway Ditch (KHD). The
9 Ege property was successfully flood-irrigated through a series of ditches that began at a head
10 gate on the MMD until the late 1960's. *Declaration of Barwin, and Exs. 1 through 5, and*
11 *Affidavit of Hayes.* The Eges' water certificates both identify the source of the water right as the
12 Methow River, and the point of diversion as the point at which the MMD diverts water from the
13 SWS. *Declaration of Barwin in support of Ecology's Reply.*

14 The effects of multiple natural events and some human interventions made utilization of
15 the ditch system increasingly difficult. Flood induced channel incision lowered the bottom level
16 of the SWS. In response to the flooding, dikes were constructed which covered the previously
17 existing open diversions from the Methow River to the SWS. Culverts were installed in the
18 dikes, but they were inadequately sized to allow sufficient flow into the SWS. As a result of the
19 lowering of the water surface elevation in the SWS, the Eges' property, which is at a relatively
20 high elevation in relation to the SWS and MMD, could no longer be flood-irrigated with water
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1 from the MMD. This situation began in the early 1970's and has continued on to the present.

2 *Declaration of Barwin, and Exs. 1 through 5, Affidavit of Hayes, Affidavit of Woodward,*
3 *Declaration of Pors, Tab 1 (Lee Whittaker, "History of the McKinney Mountain regional*
4 *irrigation system.")*

5 It is undisputed that water was available for a significant portion of each irrigation season
6 at the source designated by the Eges' water right, the Methow River, *Declaration of Barwin in*
7 *support of Ecology's Reply.* Other than a brief period in the 1970's when flood irrigation may
8 have occurred, Ecology and the Eges agree that there has been no use of water for irrigation of
9 any kind on the Ege property since the early 1970's. *Declaration of Barwin, Declaration of*
10 *Woodward, Affidavit of Hayes.*

11 After water flows into the SWS and MMD became limited, MMD ditch owners,
12 including former owners of the Ege property, undertook efforts to rectify the problem of the
13 lower water level in the ditch. Former owners of the Ege property contributed money and labor
14 to these efforts. In particular, the ditch association made efforts to repair the dike and install
15 larger culverts at the intake to the SWS, which would have allowed more water from the river to
16 reach the MMD. These various efforts were unsuccessful for many reasons, one of which was
17 the ultimate refusal of a Department of Fish and Wildlife employee in 1987 to allow installation
18 of larger culverts or to allow the culverts to be installed at a lower elevation to account for the
19 scouring of the bed of the SWS. *Affidavit of Hayes, Affidavit of Ege.* The Eges assert reliance on
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1 these long-term community efforts in lieu of adopting an individual solution to the irrigation
2 problems experienced on the Ege property.

3 In the years when water levels were too low in the SWS and MMD for flood irrigation,
4 other affected water right holders took steps to continue to utilize their water rights. These water
5 right holders switched to pumping water from the MMD or from other surface water bodies, or
6 used water from existing domestic wells to run sprinkler systems for irrigation. At least some of
7 these actions were taken without appropriate approvals from Ecology. *Declaration of Barwin;*
8 *Supplemental Declaration of Ege.*

9 The Eges' property did not have an existing well. Mr. Ege estimated that in the 1970's it
10 would have cost in excess of \$50,000 to install a well and other systems necessary to irrigate
11 with sprinklers. No evidence was introduced relating to the cost of installing a pump in the
12 MMD or SWS. Mr. Ege questioned the reliability of this method of obtaining water, however,
13 because of the current minimal flows in the MMD. *Supplemental Declaration of Ege.*

14 In the spring of 2002, the Methow River changed course and moved several hundred feet,
15 rendering the SWS and MMD useless. Also in 2002, a salmon recovery grant was approved for
16 the McKinney Mountain region to help the irrigators move to groundwater sources and abandon
17 the MMD. The property owners that had utilized the ditch system for water decided to proceed
18 with change applications. *Declaration of Barwin and Exs. 1 through 4, Affidavit of Hayes,*
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1 *Declaration of Pors, Tab 1 (Lee Whittaker, History of the McKinney Mountain regional*
2 *irrigation system.”)*

3 The Eges submitted their change applications on April 7, 2004. Although Ecology
4 approved the change applications for many of the other water right holders, including those that
5 had used domestic wells to irrigate, it denied the Eges’ applications. The basis for the denial was
6 the nonuse of water. The Eges appealed the denial to this Board, and both parties have filed
7 motions for summary judgment.

8 Analysis

9 A. Summary Judgment Standard

10 I.

11 Summary judgment is a procedure available to avoid unnecessary trials on formal issues
12 that cannot be factually supported and could not lead to, or result in, a favorable outcome to the
13 opposing party. *Jacobsen v. State*, 89 Wn. 2d 104, 108, 569 P.2d 1152, 1155 (1977). The party
14 moving for summary judgment must show there are no genuine issues of material fact, and the
15 moving party is entitled to judgment as a matter of law. *Magula v. Benton Franklin Title Co.,*
16 *Inc.*, 131 Wn. 2d 171, 182; 930 P. 2d 307, 313 (1997). A material fact in a summary judgment
17 proceeding is one affecting the outcome under the governing law. *Eriks v. Denver*, 118 Wn.2d
18 451, 456, 824 P. 2d 1207, 1210 (1992). The trier of fact must construe the evidence and consider
19 the material facts and all reasonable inferences therefrom in the light most favorable to the
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1 nonmoving party. *Weatherbee v. Gustafson*, 64 Wn. App. 128, 131, 822 P. 2d 1257 (1992). If
2 the moving party is a respondent and meets this initial showing, then the inquiry shifts to the
3 party with the burden of proof at trial. If, at this point, the non-moving party fails to make a
4 showing sufficient to establish the existence of an element essential to that party's case, and on
5 which that party will bear the burden of proof at trial, then the trial court should grant the motion.
6 *Young v. Key Pharmaceuticals, Inc.*, 112 Wn. 2d 216, 225, 770 P.2d 182, 187(1989).

7 II.

8 Here, the Board concludes there are material facts related to the causes for nonuse of
9 water that have not been fully set out in the record, and therefore, this matter cannot be decided
10 on summary judgment.

11
12 B. Relinquishment of Water Rights

13 III.

14 The Eges applied for a change in the point of diversion pursuant to RCW 90.03.380.
15 Ecology denied the Eges' application for a change because it concluded the Eges had
16 relinquished their water rights.

17 IV.

18 Under RCW 90.03.380, the purpose and place of use and point of withdrawal or
19 diversion of valid water rights may be changed, provided there is no detriment or injury to
20 existing rights. In order to decide whether to approve a change under RCW 90.03.380, Ecology

1 must tentatively determine the existence and extent of the beneficial use of a water right.
2 *Okanogan Wilderness League, Inc. v. Town of Twisp*, 133 Wn.2d 769, 778-79, 947 P.2d 732
3 (1977). Ecology must address whether the right has been relinquished or abandoned in whole or
4 in part in deciding whether to approve a transfer or change application. *R.D. Merrill Co. v.*
5 *Pollution Control Hearings Board*, 137 Wn.2d 118, 127, 969 P.2d 458 (1999).

6 V.

7 When disputes arise about nonuse, Ecology has the initial burden of proof on the lack of
8 beneficial use of a water right for five consecutive years. *R.D. Merrill*, 137 Wn. 2d at 140. Once
9 nonuse is established, the burden shifts to the water rights holder to show that the nonuse falls
10 within a statutory exception. *Id.* Such exceptions must be narrowly construed. The *R.D. Merrill*
11 Court provided the following direction in interpreting exceptions to relinquishment:

12 In addressing the exceptions to relinquishment, it is important to bear in mind that
13 generally exceptions to statutory provisions are narrowly construed in order to give effect
14 to legislative intent underlying the general provisions.

14 *Id.*

VI.

15 The statutory relinquishment standard is set out in RCW 90.14.180. It provides:

16 Any person hereafter entitled to divert or withdraw waters of the state through an
17 appropriation authorized under RCW 90.03.330, 90.44.080, or 90.44.090 who abandons
18 the same, or who **voluntarily fails, without sufficient cause, to beneficially use all or**
19 **any part of said right to withdraw for any period of five successive years shall**
20 **relinquish** such right or portion thereof, and such right or portion thereof shall revert to
the state, and the waters affected by said right shall become available for appropriation in
accordance with RCW 90.03.250. All certificates hereafter issued by the department of
ecology pursuant to RCW 90.03.330 shall expressly incorporate this section by reference.

(Emphasis added.)

VII.

Sufficient cause, which is the exception to the rule of relinquishment, is addressed by statute. RCW 90.14.140(1) states:

(1) For the purposes of RCW 90.14.130 through 90.14.180, "sufficient cause" shall be defined as the nonuse of all or a portion of the water by the owner of a water right for a period of five or more consecutive years **where such nonuse occurs as a result of:**

(a) Drought, or other unavailability of water; . . .

(Emphasis added)

VIII.

Here the Eges concede that their water rights have not been used for a period in excess of five consecutive years. Therefore, Ecology has met its burden to prove a lack of beneficial use for the required period. The burden of proof then shifts to the Eges to establish sufficient cause, justifying an exception to the rule of relinquishment.

IX.

The Eges argue that there was sufficient cause for the nonuse because water became unavailable through the MMD system. They also assert that it was reasonable to rely on community efforts to solve water availability issues from 1970 through 2002, when grants became available to convert to groundwater use. Ecology asserts that the relinquishment occurred as early as 1977 after five years of continual nonuse of the water right, and that the water right must have relinquished after more than thirty years of non-use. Ecology contends there was water available in the Methow River and the diversion point on the SWS throughout

1 the period of nonuse, and therefore there was no unavailability of water, and accordingly, no
2 “sufficient cause” for nonuse, especially nonuse for a period approaching 30 years. In support of
3 this argument Ecology cites to a prior decision of the Board, *Big Creek Water Users Ass’n. v.*
4 *Dep’t of Ecology and Trendwest Investments, Inc.*, PCHB No. 02-113 (Order Granting Summary
5 Judgment) (Dec. 16, 2002).

6 X.

7 In *Big Creek*, the Board was considering whether a change of water rights for one holder
8 impaired another water right holder’s rights. As a starting point for its analysis, the Board
9 focused on the nature of the existing right. In this context the Board stated “the place of
10 measurement of appropriated water is at the point it is diverted from the stream, rather than at a
11 point below the point of diversion in a ditch system.”

12 XI.

13 Ecology argues that the *Big Creek* decision stands for the proposition that availability of
14 the water at the point of diversion controls the analysis of whether there is an exception to
15 relinquishment, not whether water is available at a headgate below the point of diversion. The
16 Board agrees with Ecology that the point of diversion is the place to begin the analysis of the
17 availability of water. However, the key question raised by the facts of the present case is what
18 defines “unavailability” sufficient to justify the nonuse of water? If water exists at the point of
19 diversion, but it is completely or to some degree inaccessible to the water holder, then is it
20 available such that the nonuse was voluntary? *Big Creek* does not answer this question.

1 XII.

2 The Eges, meanwhile, argue that while there may have been water in the SWS, there was
3 not water at a sufficient level in the MMD so the Eges could flood irrigate. Therefore, they
4 argue, the water was effectively unavailable. They contend their nonuse was not voluntary, as
5 required by RCW 90.14.180, because they and their predecessors supported efforts to fix the
6 ditch over a long period of time, and they should not now lose their water rights just because
7 those efforts were unsuccessful. Further, they argue, it was not cost effective for them to switch
8 to a well while efforts were ongoing to fix the ditch. The Eges also assert that Ecology is
9 applying a new standard of due diligence in order to claim the relinquishment exception of
10 unavailability of water, and that this standard is neither expressly mentioned in the
11 relinquishment chapter nor reasonably implied from its provisions. The Eges contend that if the
12 exercise of due diligence is required in order to claim this exception, they have met this standard.

13 XIII.

14 The Eges also contend they have a right to flood irrigate their property, and “[t]he non-
15 availability exemption from relinquishment for non-use, and RCW 90.14.140 in general, do not
16 require a water right holder to demonstrate any particular effort to bring about a change to
17 problems not of his own making.” *Notice of Appeal*, p. 4. Support for this argument is offered
18 by *Ecology v. Grimes*, 121 Wn.2d 459, 852 P. 2d 1044 (1993), where the Washington Supreme
19 Court has stated that “[i]ncluded in the vested rights is the right to diversion, delivery and
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1 application ‘according to the usual methods of artificial irrigation employed in the vicinity where
2 such land is situated.’” *Grimes* at 477 (quoting RCW 90.03.040 in part).

3 XIV.

4 The sufficient cause statute states that the nonuse of water must occur “as a result of” the
5 unavailability of water. Ecology urges the Board to apply the reasoning used by the *R.D. Merrill*
6 Court, which in analyzing the similar exception to relinquishment for the operation of legal
7 proceedings contained in RCW 90.14.140(1)(d), opined:

8 Read narrowly to preserve the general statutory provisions, the exception requires that the
9 nonuse of water be attributable to the legal proceedings, i.e., that the legal proceedings
10 prevent the use of the water. This approach is in keeping with the general provisions
11 favoring beneficial use of water unless there is some legitimate reason why the water
12 cannot be used. Here, while development plans may have been delayed as a result of the
13 litigation, it is not clear whether beneficial use of the water for other purposes was
14 prevented while the litigation was pending.

15 *R. D. Merrill* at 141, 142.

16 XV.

17 The Eges respond that in a similar situation the Yakima Superior Court, as part of the
18 Acquavella adjudication, held that a water right holder was not required to pump water to the
19 property after the point of diversion was destroyed. The Court found that a water right user
20 claiming the “operation of legal proceedings” or “unavailability of water” exceptions were not
21 “under any specific duty to go to such lengths to utilize water.” *James and Linda Poisel v.*
Ecology, (*Ecology v. Acquavella*), Yakima County Superior Court No. 77-2-01484-5,
Memorandum Opinion, dated Nov. 4, 2004, *clarified by* Memorandum Opinion, dated December

1 6, 2004. The Eges contend that the low level of water in the SWS *has* prevented the use of the
2 water – by the flood irrigation method. Ecology asserts the water is available through other
3 methods, which have been utilized by other nearby property owners.

4 XVI.

5 In order to determine whether a water rights holder has shown sufficient cause for nonuse
6 of water based on the “unavailability” exception of RCW 90.14.140(1), the Board must
7 determine the proper legal standard for defining the term “unavailability” and look to the facts of
8 this case in relation to that standard. The parties offer the Board varying standards by which to
9 assess the conduct of a water rights holder claiming an exception from relinquishment under this
10 portion of the statute. Neither the courts nor the statute set out a definitive test to apply in this
11 type of relinquishment situation.

12 XVII.

13 Ecology argues that “[w]ater right holders must pursue all practicable remedies to ensure
14 that water rights are beneficially used to avoid relinquishment.” *Memorandum in Support of*
15 *Ecology’s Motion for Partial Summary Judgment*, p. 12. The Eges argue for a more general rule
16 of reasonableness and “common sense”, asking the Board to look to the reasonableness of the
17 parties conduct in each situation. *Memorandum in Support of Eges’ Motion for Summary*
18 *Judgment*, p. 10. An examination of relinquishment cases assists in defining the standard, which
19 the Board concludes in somewhere in between those proposed by the parties.

1 XVIII.

2 In *Georgia Manor Water Association v. Ecology*, PCHB No. 93-68 (Nov. 9, 1994), the
3 Board held that actions constituting “sufficient cause” under RCW 90.14.140(1) are actions
4 “outside the control of the water user.” *Georgia Manor* at CL VII. To constitute an involuntary
5 period of nonuse, the unavailability of water must be due to actions outside the control of the
6 water user. *Georgia Manor* at 11. Other cases interpreting the “sufficient cause” language of
7 RCW 90.14.140(1) have also found an exception to relinquishment when actions outside the
8 control of the water user have made beneficial use difficult or impossible. The *R.D. Merrill*
9 holding that legal proceedings must actually *prevent* the use of water in order for a water rights
10 holder to successfully claim an exception under that section of the statute is consistent with this
11 reasoning. *R.D. Merrill* at 141-142. In *Poisel*, the combination of a destroyed diversion
12 structure and lack of action by Ecology combined to allow the Poisels to avoid relinquishment.
13 Other Acquavella related cases have held that where breakdowns prevent diversion and there has
14 been “reasonable maintenance,” sufficient cause has been shown by the water rights holder.
15 *Cascade Irrigation District v. Ecology*, (*Ecology v. Acquavella*), Yakima County Superior Court
16 No. 77-2-01484-5, Memorandum Opinion, dated Dec. 10, 2001.

17 XIX.

18 On the other hand, where the water rights holder could take certain steps to access or use
19 water, or take actions within their own control, this Board and the courts have concluded that
20 there was not sufficient cause excusing the nonuse of water for an extended period of time. In

1 *Pacific Land Partners, LLC. v. Ecology*, PCHB No. 02-037 (May 9, 2005), the Board looked to a
2 number of steps the water rights holder could have taken to address a siltation issue, and noted
3 that other “systems are readily available and reasonably priced.” Id. at FF 14. In *R.D. Merrill*,
4 the court looked to see if the water rights holder had proceeded in the exercise of “*reasonable*
5 *due diligence*” in taking steps to implement the fixed development plan that had formed the basis
6 for the relinquishment exception. *R.D. Merrill* at 146 (emphasis added).

7 XX.

8 Underlying the analysis in each of these cases was an assessment of the reasonableness of
9 the nonuse based on the amount of control the water rights holder had in the particular situation.
10 In those cases where the water rights holder had some ability to use water, even if obstacles or
11 difficulties were presented, reviewing bodies have examined the reasonableness of the actions of
12 the water rights holder and their diligence in making beneficial use of the water. *R.D. Merrill*
13 referred to this as a “reasonable due diligence” standard. *Pacific Land Partners* looked to a
14 variety of factors, including the actions by nearby landowners to successfully irrigate, cost,
15 available technology and placement of intake devices—all potential indicia of the reasonableness
16 of the water rights holder’s decision to use or not use the water right.

1 XXI.

2 Accordingly, the Board concludes that a two part test or inquiry is to be applied where a
3 water rights holder claims sufficient cause for nonuse based on the “drought, or other
4 unavailability of water” exception to relinquishment, as follows²:

5 Has the water rights holder proved sufficient cause for the nonuse of water due to actions
6 reasonably outside their control?

7 If there were actions the water rights holder could have taken to make beneficial use of
8 the water, did they take reasonably diligent steps to do so?

8 XXII.

9 Applying this test to the case at hand, the Eges have not met their burden on summary
10 judgment to show that events outside their control, either natural or man-made, have deprived
11 them of the ability to use the water altogether. The Eges did produce substantial evidence about
12 the changes in the water levels in the MMD and SWS and the efforts they and their predecessors
13 made to reestablish the ability to flood irrigate. However, this evidence does not fully explain
14 how the water was unavailable or its use prevented through means other than flood irrigation.
15 Nor have the Eges presented on summary judgment sufficient undisputed facts to demonstrate
16 that they took reasonably diligent steps to make use of the water at the points where it may have
17 been accessible. The Eges’ reliance on the efforts of third parties and the Ditch Association to
18 correct the problems in the MMD is a relevant consideration in assessing the reasonableness and
19 diligence of their attempts to make use of the water, but it is only one of several relevant factors

20 ² If the parties wish to present further argument on this test, they may do so in pre-hearing briefs and in argument at
21 the hearing.

1 that should be considered in the analysis. The Board requires further evidence of whether and
2 how the water rights could have been exercised by flood irrigation or other changed irrigation
3 methods.

4 XXIII.

5 In summary, the Board does not find the factual record on summary judgment sufficient
6 to determine whether the Eges' nonuse of water was due to its unavailability based on actions
7 outside of their control. Further, while the Eges and their predecessors could not control the
8 level of water in the MMD, they had potential opportunities to access the water in the SWS and
9 MMD and possible alternatives in the manner in which they could irrigate the property. There
10 was a minimal amount of evidence introduced regarding the potential costs of using a pump to
11 irrigate the Eges' property, but the Board is not satisfied that the record on summary judgment is
12 sufficiently complete for it to determine that the Eges used reasonable diligence in pursuit of
13 means to make beneficial use of the water rights. Testimony at hearing would provide or clarify
14 facts related to available diversion and irrigation options, availability of water at the diversion
15 point, available and changing technology, cost, strategies used by other irrigators, the relevance
16 of these factors, and other considerations best left to the parties to address. Such evidence will
17 allow the Board to decide whether the long period of nonuse of the water rights at issue is
18 directly attributable to the unavailability of the water or whether the right has been relinquished.

1 XXIV.

2 Based on the foregoing analysis, the Board enters the following

3 ORDER

4 Both the Eges' and Ecology's motions for summary judgment are denied. This case will
5 go to hearing based on the analysis and direction provided by this opinion.

6 DONE this 10th day of February 2006.

7 POLLUTION CONTROL HEARINGS BOARD

8 William H. Lynch, Chair

9 Kathleen D. Mix, Member

10 Kay M. Brown, Presiding
11 Administrative Appeals Judge